

*In the Matter of Crystal Snyder, New Jersey Veterans Memorial Home,
Vineland*

DOP Docket No. 2005-1629

(Merit System Board, decided March 8, 2006)

The appeal of Crystal Snyder, a Human Services Technician with the New Jersey Veterans Memorial Home, Vineland, of her two removals, effective October 4, 2004,¹ on charges, was heard by Administrative Law Judge W. Todd Miller (ALJ), who rendered his initial decision on November 18, 2005. Exceptions were filed on behalf of the appointing authority and cross-exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL) and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on March 8, 2006, did not adopt the ALJ's recommendation to reverse the removals. Rather, the Board modified the penalty to a three-month suspension.

DISCUSSION

The appointing authority removed the appellant on charges of neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in danger to persons or property, and physical or mental abuse of a patient, client, resident or employee. Specifically, the appointing authority asserted that on March 27, 2004, the appellant failed to provide appropriate care for a male patient and that she refused to provide such care when asked to do so. Additionally, the appointing authority asserted that on March 30, 2004, the appellant left a female patient for 15 minutes, even though the appellant was aware the patient had soiled herself. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

March 30, 2004 Incident

In his initial decision, the ALJ noted that with regard to the March 30, 2004 incident, the appellant was assigned to monitor the solarium from 6:00 p.m. to 6:30 p.m. and that at approximately 6:15 p.m., she noticed that the

¹ Two Final Notices of Disciplinary Action (FNDA) were issued on October 4, 2004, removing the appellant. The first FNDA was on charges of physical or mental abuse of a patient, client, resident or employee regarding two incidents which took place on March 27 and March 30, 2004. The second FNDA was on charges of neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in danger to persons or property regarding the two incidents which took place on March 27 and March 30, 2004.

Female Patient had soiled herself. The ALJ found that it was undisputed that while monitoring the solarium, a Certified Nurse's Aide (CNA) (*i.e.*, a Human Services Technician) was not allowed to leave until another CNA relieved him or her. The ALJ also found that both the appellant and Cynthia Dawkins, a CNA, testified credibly that the appellant only left the Female Patient for approximately 10 to 15 minutes after being relieved at 6:30 p.m. before she returned and provided care to the Female Patient. Moreover, the ALJ found that although there was some dispute as to what duties the appellant was doing during that time period (*i.e.*, taking vital signs or going to the Female Patient's room to initiate care), both the appellant and Dawkins testified that the appellant was performing her duties. Consequently, the ALJ determined that the appointing authority had not supported the charges. Upon a *de novo* review of the record, including a review of the testimony, the Board agrees with the ALJ's determination to dismiss the charges with regard to the March 30, 2004 incident.

March 27, 2004 Incident

The ALJ noted that with regard to the March 27, 2004 incident, all of the witnesses indicated that they were aware that the appellant was pregnant. The ALJ also noted that all of the witnesses confirmed that the Male Patient could be combative. However, the witnesses differed as to whether he was more or less combative than other patients on the unit, most of whom suffered from Alzheimer's. The ALJ also noted that several of the witnesses testified that if they were pregnant, they would be concerned about caring for the Male Patient.

Wanda Hall, Supervisor of Nurses, testified that she had concluded that the appellant's actions were inappropriate. Hall maintained that her conclusions were based on the appellant's admissions that she was afraid of the Male Patient and had refused to provide care to him. Judy Brown, Director of Nursing (DON), testified that she had not received any complaints that the appellant was fearful of being injured by a combative patient. Brown also testified that pregnancy would not usually warrant an accommodation unless a doctor's note was submitted indicating the need for an accommodation due to a condition and/or concern relating to the pregnancy. Mary Wise, Head Nurse, testified that the appellant had never requested an accommodation due to her pregnancy. However, Jeanette Webb, a CNA, and several other witnesses testified that the CNAs tend to work as a "team" and help other CNAs who cannot complete a task. Wise confirmed that although official changes had to be approved by the appointing authority, the CNAs did work as a team and "share responsibilities between patients."

Webb testified that although the appellant had requested a change of assignment with regard to the Male Patient on other occasions, the appellant had not requested a change of assignment on March 27, 2004. Webb testified that although she heard the appellant state that she would not change the Male Patient, the appellant had not requested Webb to help with his care on March 27, 2004. Audrey Morrison, a CNA, also testified that she heard the appellant state that she would not care for the Male Resident. However, Morrison did not understand the appellant's statement to be a request for assistance. Rather, she believed the appellant was joking.

Wise testified that at approximately 7:15 p.m., she noticed the Male Patient sitting in the solarium with food on his bib. In response to her questioning, the appellant stated that she was assigned to the Male Patient, but that she would not care for him because he had kicked her in the stomach the previous week. Therefore, Wise asked Rivera to provide the Male Patient with his evening care. The ALJ noted that Wise testified that there was no evidence that the Male Patient had been neglected and/or abused from 3:00 to 7:00 p.m. Webb also noted that the Male Patient was not unusually dirty or neglected, he was simply not in his bedclothes at his normal time. Maria Rivera, a CNA, testified that she was asked to provide care to the Male Patient at approximately 7:00 p.m. by the Charge Nurse. However, Rivera testified that, based on her observation, she could not conclude that he had lacked proper care prior to that time. Specifically, she noted that the Male Patient was "wet times two" which she described as not being uncommon.

The appellant testified that she began to ask for a reassignment from the Male Patient in September 2003, before she was pregnant. Specifically, she asserted that the Male Patient would become more upset and more combative with her and she therefore, felt it was "cruel" to continue to provide care to him. The appellant asserted that in January 2004 she received another assignment, which did not include the Male Patient. As a result, her contact with the Male Patient was limited although she was not fully relieved of caring for him. The appellant explained that she was assigned to the Male Patient on March 27, 2004, since the CNA normally assigned was not on duty. The appellant testified that after she received her assignment, she commented that she was "not doing him today." She maintained that Morrison said in response not to worry, "someone" would help her. However, the appellant confirmed that she did not ask the Head Nurse or any other supervisor to be reassigned. The appellant claimed that she was able to move the Male Patient from one chair to another and to feed him, without him becoming combative. However, since she knew that he would become combative if she attempted to change his clothing, she refused to do so. The appellant further explained that when Wise told her to change the Male Patient, she told Wise that she would not change him because he

had punched her in the stomach the week before. Although the appellant indicated that she told other co-workers who were on duty when the incident occurred, she maintained that she did not complete an incident report nor had she told Wise, who had not been on duty. Instead, the appellant claimed that she had previously asked Wise to reassign her from the Male Patient and she claimed that Wise had been aware that the Male Patient had hit her on other occasions. However, Wise had not reassigned her on those other occasions.

Based on the foregoing testimony, the ALJ found that the witnesses stated that the Male Patient had received appropriate care on March 27, 2004. Specifically, he noted that the witnesses testified credibly that there was no evidence of neglect. Rather, the Male Patient was “wet times two” and had not been changed into his pajamas at his normal time. Moreover, the ALJ found that the witnesses all testified that the CNAs work as a team and therefore, no patient would be left “unattended to if at all possible.” Furthermore, the ALJ noted that at the direction of the Head Nurse, the Male Patient was changed into his pajamas. The ALJ concluded that the appellant had not acted with malice in not providing the Male Patient with his evening Care. Instead, he noted that the appellant had been concerned for her own safety and well-being. In that regard, the ALJ noted that the relationship between the appellant and the Male Patient (*i.e.*, that he would become combative with her) and the fact that the appellant was pregnant were important considerations. Moreover, the ALJ found that the appointing authority had provided the appellant with an informal accommodation due to her pregnancy even though it was undisputed that reasonable accommodations are not available for pregnancy when there is no medical documentation that an accommodation is medically necessary. Therefore, the ALJ found that although the “appellant should have requested a formal change of assignment on March 27, 2004, [the appointing authority] should not have assigned [the] appellant to the Male Patient.” Consequently, the ALJ determined that the appointing authority had not supported the charges and he reversed the removals.

Upon its *de novo* review of the record, including the testimony provided at the hearing, the Board does not agree with the ALJ’s recommendation and upholds the charges. The Board acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). “[T]rial courts’ credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record.” *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be

explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Board appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Board has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. See *N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In this case, upon review of the entire record, including the testimony provided at the hearing, the Board finds that there is insufficient evidence in the record to overturn the ALJ's credibility determinations.

However, the Board disagrees with the ALJ's conclusion that the appellant's actions regarding the Male Patient did not constitute neglect of duty. The appellant's testimony indicates that, on the date in question, she refused to care for the Male Patient on at least two occasions. While the appellant testified that she believed that other staff would care for the Male Patient, there is no indication in the record that any of her co-workers explicitly agreed to tend to the Male Patient. Further, there is no evidence that the appellant asked for a formal change in assignment or an accommodation on the evening in question. Regardless, even if an accommodation was available, the appellant had not asked for, nor presented medical documentation, that a reasonable accommodation was necessary. In this regard, it is noted that the appellant testified that she began requesting a change of an assignment *before* she was pregnant. Moreover, the appellant's explicit refusal to care for the Male Patient when told to do so by Wise cannot be excused. While the fact that the Male Patient appears not to have been subjected to harm supports the conclusion that he was not the victim of client abuse, the appellant's refusal to care for him constitutes neglect of duty. Although the Board is sympathetic to the appellant's concerns, it was the appellant's responsibility to provide care to the Male Patient. Moreover, the Male Patient was part of a vulnerable population, who was unable to care for himself. Therefore, the fact that he was eventually cared for by another employee is immaterial.

In determining the proper penalty, the Board's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Board utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R.* 2d (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See *Henry v. Rahway State*

Prison, 81 N.J. 571 (1980). Upon an independent review of the record and in consideration of the appellant's prior record of service, the Board concludes that removal is too harsh a penalty. A review of the appellant's disciplinary history reveals a prior counseling for neglect of duty, which is not considered discipline. In the instant matter, the infraction is not so inherently egregious that it warrants the appellant's removal in light of her nine years of service which includes no discipline. Therefore, the Board determines that the appropriate penalty is a three-month suspension. It is noted that the three-month suspension is a severe major disciplinary action which places the appellant on notice that any future infractions may lead to more serious penalties, up to and including removal. Accordingly, the foregoing circumstances provide a sufficient basis to modify the removal imposed by the appointing authority to a three-month suspension. See N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d).

With regard to the appellant's reinstatement, it is noted that the ALJ stated in his initial decision that he "would strongly urge that appellant's name be removed from the central abuse registry." In this regard, it is noted that the appellant's Nurse's Aide Certification was revoked on September 13, 2004 and her name placed on the New Jersey Nurse Aide Abuse Registry (Registry). In her cross- exceptions, the appellant maintained that she was confused as to the placement of her name on the Registry, but that she would now appeal that designation. It is noted that on August 10, 2004, the Division of Long Term Care Systems, Department of Health and Senior Services (DHSS), sent the appellant by certified mail a Notice of Right to Hearing. The appellant signed the certified mail receipt which was returned to the DHSS. Since the charge against the appellant was neglect, after one year she could have written to the Office of Program Compliance and requested that the finding of neglect be removed from the Registry. However, the appellant's name still appears on the Registry. It is noted that the appellant is scheduled to attend an informal conference on April 25, 2006 at the DHSS to discuss the removal of her name from the Registry. It is further noted that the job specification for Human Services Technician requires that individuals serving in that title, in long term nursing care facilities for the appointing authority, possess a valid Certification as a Nurse's Aide. Therefore, prior to the appellant's reinstatement, she must obtain her Nurse's Aide Certification. Consequently, the appointing authority is under no obligation to take the appellant back until she actually receives her Certification. If the appellant fails to obtain her Certification, she will be recorded as resigned in good standing.

Since the penalty has been reduced, normally, the appellant would be entitled to mitigated back pay, benefits and seniority pursuant to N.J.A.C. 4A:2-2.10. However, since she did not possess her Nurse's Aide Certification

during the period at issue, she would not be entitled to back pay since she could not have been employed as a Human Services Technician without the Certification. Therefore, the appellant is only entitled to back pay from the date of her new Certification until her reinstatement with the appointing authority.

With regard to counsel fees, the primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121, 128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). Since the appellant has not prevailed on all or substantially all of the primary issues on appeal, she is not entitled to an award of counsel fees. See N.J.A.C. 4A:2-2.12. In this regard, even though the Board agreed that the March 30, 2004 incident was not a basis for discipline, the Board still upheld the disciplinary charges set forth on the Final Notice of Disciplinary Action. Moreover, the Board notes that the March 27, 2004 incident was clearly the more severe of the two incidents.

ORDER

The Merit System Board finds that the appointing authority's action in imposing a removal for the March 27, 2004 incident was not justified. Therefore, the Board modifies the penalty to a three-month suspension. Further, the Board dismisses the charges with respect to the March 30, 2004 incident. The Board also orders that if the appellant fails to obtain her Nurse's Aide Certification, she will be resigned in good standing. The Board further orders that the appellant be granted back pay, benefits and seniority for any period of time she possesses her Nurse's Aide Certification until her actual reinstatement. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned by the appellant during this period.

Counsel fees are denied pursuant to N.J.A.C. 4A:2-2.12.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.